QUESTION PRESENTED

Whether a token offer by a defendant, which the district court found to be not even arguably reasonable, serves, by virtue of Rule 68, to take away from the district court the discretion conferred by Rule 54(d) to decline to award costs against an unsuccessful plaintiff who in good faith had sought to vindicate an important civil right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-814

DELTA AIR LINES, INC.,
Petitioner,

v.

ROSEMARY AUGUST.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has over the past fifteen years enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The question at issue here is whether a token offer by an employer, which the district court found to be not even arguably reasonable, serves, by virtue of Rule 68, to take away from the district court the discretion conferred by Rule 54(d) to decline to award costs against an unsuccessful plaintiff who in good faith sought to vindicate an important civil right. This is a question which manifestly affects, not only employment cases under Title VII of the Civil Rights Act of 1964, but other forms of litigation. Because the position which petitioner espouses could have a chilling effect on civil rights plaintiffs, the Committee files this brief in support of respondent urging affirmance of the judgment below.[1]

STATEMENT

In January, 1977, plaintiff filed suit against Delta Airlines in the Northern District of Illinois under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(f)(1)). She alleged that her discharge in August, 1975 had been the result of discrimination on account of race.

In May 1977, Delta submitted to plaintiff the following offer in writing (J.A. 34):

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorneys' fees together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

The offer was not accepted.

[1] The parties' written consents to the filing of this brief are being filed with the clerk pursuant to Rule 36 of the Rules of the Supreme Court.

After trial, the district court granted judgment to the defendant. While finding that Delta improperly subjected plaintiff to a physical examination and had taken stern measures against blacks in general and plaintiff in particular (J.A. 29-30), the court concluded that plaintiff had not established that Delta's employment practices were racially premised (J.A. 32).

In entering judgment for Delta, the court ordered that each side "bear its own costs of litigation" (J.A. 32). Delta moved for reassessment of costs, claiming that, in view of its offer of judgment for $450 in May 1977, costs had to be assessed against plaintiff by mandate of Rule 68. The district court denied the motion (J.A. 14). It held that, "in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable" (J.A. 11). Noting that the Rule was intended to encourage early settlements of litigation, the court said (J.A. 11):

> If the purpose is to encourage settlement, it is impossible for this Court to concede that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The court of appeals affirmed the district court, both on the merits and on its interpretation of Rule 68. Noting Delta's argument that any offer of judgment under Rule 68 would serve to shift cost liability if plaintiff did not ultimately recover, the court below said (J.A. 5):

> If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged. Unrealistic use of the rule would not encourage settlements, avoid protracted litigation, or relieve courts of vexatious litigation.

The court below pointed out that, at the time the offer of $450 was tendered, plaintiff's damages from loss of employment exceeded $20,000, not including costs and attorneys' fees, and that, if successful, plaintiff would have sought reinstatement as a stewardess. It noted that her claim was not frivolous; that she had presented some evidence suggesting racial bias (J.A. 5). It concluded that, against that general background, Delta's Rule 68 offer of judgment was "not of such significance in the context of this case to justify serious consideration by the plaintiff." At least in Title VII cases, the court held, Rule 68 should be given a liberal and not a technical interpretation (J.A. 7).

SUMMARY OF ARGUMENT

On its face, Rule 68 shows that it was designed to apply to the situation where a defendant admits liability but disputes the extent of relief sought by the plaintiff. The history of the Rule confirms this conclusion. It apparently grew out of the common law practice of permitting a defendant to deposit in court the money he admitted was due in order to stop the running of interest and costs. This was an admission of liability. Indeed, under the modern codification of that practice in Rule 67 of the Federal Rules, a deposit is not allowed if the defendant still disputes all liability.

For this reason Rule 68 may properly be interpreted as applying only where the plaintiff does recover judgment, although for less than the amount offered. Rule 68 mandates liability for costs on a party who otherwise would be entitled to recover, rather than pay, costs, *i.e.*, a successful plaintiff. It should not be read to relate to the wholly different situation of an unsuccessful plaintiff who would normally be required to pay costs, but who a court for good reason decides should be freed of that obligation.

In any event, Rule 68 does not apply to a proposal which, although in form an offer of judgment, is in reality nothing more than a general denial and thus a sham. Even in as technical a field as tax law, this Court has recognized that a transaction which in form would qualify as a basis for a deduction need not be so treated where the transaction had no substance in reality. *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Gregory* v. *Helvering*, 293 U.S. 165, 170 (1940).

Thus, the interpretation of Rule 68 as not applying to an offer which is not genuine does not read into the rule words which the framers did not put there. It merely interprets the rule, as statutes have always been interpreted, in a way which accords with its purpose and prevents absurd results.

ARGUMENT

RULE 68 DOES NOT APPLY TO A PROPOSAL WHICH IS NOT A GENUINE OFFER OF JUDGMENT

The award of costs at the conclusion of a case is governed by Rule 54(d), F.R. Civ. P., which provides that, except where there is express provision by statute or rule, costs will be allowed to the prevailing party as of course "unless the court otherwise directs." This has been construed to vest in the district court discretion as to the award of costs. *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 232-236 (1964); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 175, 184 (1946). This discretion will not be overruled except for gross abuse. *Farmer* v. *Arabian American Oil Co.*, *supra*; *Missouri Pacific R.* v. *Star City Gravel Co., Inc.*, 592 F.2d 455, 460 (8th Cir. 1979). Here the district court, in the exercise of its discretion, properly decided that each party should bear its own costs.[2]

[2] In this Court, petitioner raises a question not argued below as to whether the district court abused its discretion in denying

Relying on the use of the word "must" in Rule 68, petitioner argues that, in view of its $450 offer in May 1977, the district court was governed by a rule (i.e. Rule 68) which obliged it to award costs against the plaintiff since, having lost on the merits, she recovered less than the offer which she rejected. We do not dispute the position that, where a defendant makes a genuine offer of judgment which admits liability but questions the amount of damages or other relief claimed, a plaintiff who recovers less than the amount offered must be held liable for costs incurred after the offer was rejected. Our position is that in this case Rule 68 did not apply both because plaintiff did not recover judgment and because defendant's offer was not a genuine offer of judgment within the purview of Rule 68. In the circumstances of this case, the offer of $450 which, as the courts below found, was not even arguably reasonable, was only in form but not in substance, an offer of judgment. It was in essence no more than a general denial of any liability. It therefore did not operate to bring Rule 68 into operation.

A. The Language And History of Rule 68 Show That It Was Intended to Apply Only to the Situation Where a Defendant Admits Liability but Disputes the Extent of the Relief Sought.

On its face, Rule 68 shows that it was intended to cover only the situation where a defendant admits liability but disputes the extent of the relief claimed by a plaintiff. Under the rule, the offer must be "to allow judgment to be taken." The rule then provides that if "the judgment finally obtained by the offeree" is not more favorable than the offer, the offeree must bear the costs incurred by the offeror after rejection. Manifestly, this assumes a situation where the offeree recovers a judgment.

The history of the rule confirms that it was intended to relate to the situation where a plaintiff insists on greater relief than is offered by a defendant who does not dispute liability. As petitioner states (Pet. Br. 8), although offers of judgment were not introduced into federal practice until 1938, statutory provisions for offers of judgment had existed for a long time before that in many states. (See in addition to the cases cited at fn. 5 of petitioner's brief, *Florence Oil & Refining Company* v. *Farrar*, 119 Fed. 150 (8th Cir. 1902); *Doutritt* v. *Finch*, 84 Cal. 214, 14 P. 929 (1890); *Kaw Valley Fair Association* v. *Miller*, 42 Kan. 20, 21 P. 794 (1889).) The provisions seem to have grown out of the practice, known at common law, whereby a defendant could pay into court the money he admitted was due in order to stop the running of interest and costs. *See Kaw Valley Fair Association* v. *Miller*, *supra*. When money was paid into court, the depositor lost control of it permanently. *See Bissell* v. *Heyward*, 96 U.S. 580 (1878); *Hendon* v. *Bankers Life Co.*, 88 F. Supp. 977 (W.D. Mo. 1950). Under the modern equivalent of that practice, embodied in Rule 67 of the Rules of Civil Procedure, a deposit in court for the purpose of stopping interest and costs will not be allowed if the offeror disputes the fact that any money is due. *Blasini-Stern* v. *Beechnut Life Savers Corp.*, 429 F. Supp. 533, 534 (D. Puerto Rico 1975), *Dinkin* v. *General Aniline and Film Corp.*, 214 F. Supp. 281, 283 (S.D.N.Y. 1963). In other words, an admission of some liability is inherent in the deposit.

costs to it under Rule 54. Although not called upon to pass directly on that issue, both the district court and the court of appeals indicated that there was good reason for the district court's action in this respect. They pointed out that plaintiff's claim was not frivolous and that she had presented some evidence of racial bias. They must also have been aware that she was an unemployed stewardess without financial resources who had to bear her own litigation costs. Under these circumstances the courts below could properly find that it would be inequitable to put the burden of costs on the losing party.

That Rule 68 was understood as relating to the situation where the dispute between the parties related to relief, rather than liability, is confirmed by the decision in *Cover* v. *Chicago Eye Shield Co.*, 136 F.2d 374 (7th Cir.), *cert. denied*, 320 U.S. 749 (1943), interpreting the first version of Rule 68. As originally promulgated, the rule provided only that an offer of judgment must be made at least ten days before trial. In an action for patent infringement, where trial was customarily in two stages, (one to determine validity and the other damages for infringement), the court held that an offer of judgment ten days before the hearing on accountability but long after the trial on validity was timely since only after validity had been established could there be any issue as to the amount due. This interpretation, that an offer of judgment could await the determination of liability, was subsequently embodied in the present rule. It is a further indication that the rule deals with disputes as to relief, and not as to liability.

For this reason, there is considerable merit in the suggestion by the author of the only extended comment on Rule 68 which we have found, that the rule should apply only where the plaintiff prevails to some extent, however minor. *See Rule 68: a New Tool for Litigation*, 1978 DUKE L.J. 889, 895.

The suggested interpretation of Rule 68 limits it to the situation which is clearly its main thrust—the protection of a defendant who does not dispute liability but disputes the extent of relief sought. It finds support in an early New York decision interpreting the New York statute which is the forerunner of the federal rule. *See Connally* v. *Hyams*, 42 App. Div. 63, 58 N.Y.S. 932 (1899), holding that the New York statute did not apply to a suit in equity which was dismissed without costs to either party. The suggested interpretation of the Rule does what petitioner urges should be done; it preserves

the individual integrity of each federal rule in its own sphere (*see* Pet. Br. 14). Rule 68 mandates liability for costs on a party who otherwise would be entitled to recover rather than pay costs, *i.e.*, a successful plaintiff. It should not be read to relate to the wholly different situation of an unsuccessful plaintiff who would normally be required to pay costs but who a court for good reason decides should be relieved of costs. Thus the interpretation of Rule 68 as applying only where a plaintiff recovers judgment, rather than the position for which petitioner contends, properly harmonizes Rule 68 with Rule 54(d).

That this is so becomes evident when one considers the application of Rule 68 to class actions. If, as petitioner contends, any offer of judgment, no matter how small or how unreasonable, serves to require that costs thereafter be taxed against a plaintiff who proves finally to be unsuccessful, then a class representative, faced with an offer of judgment, will, if he has even a slight doubt as to the merits of his case, be under an obligation to present the matter to the court as an offer of compromise under Rule 23(d). Thus a court would, in effect, be itself forced, at an early stage in the proceeding, to make a judgment as to the ultimate merits, rather than to pass on a genuine offer of settlement. This aids neither the parties nor the courts. A mechanical interpretation of Rule 68, so at odds with its real purpose, should be rejected. Rule 1 mandates that the rules be construed "to secure the just, speedy, and inexpensive determination of every action." The interpretation of Rule 68 as applying only in the situation where the offeree does recover judgment, although for less than the amount offered, harmonizes Rule 68 with Rule 54(d) and Rule 23(d). It assures that a token offer will not serve to defeat the court's discretion conferred by Rule 54.

B. Rule 68 Does Not Apply to a Proposal Which, Although in Form an Offer of Judgment, Is in Reality Nothing More Than a General Denial

The judgment below may also be affirmed on the narrower ground that there was in this case no genuine offer of judgment within the purview of Rule 68. As the district court noted, under the circumstances of this case, petitioner's offer was not even arguably reasonable. Petitioner could not possibly have believed that if it was liable at all, its liability could be limited to an amount approaching $450. When its offer was made, loss of earnings alone amounted to approximately $20,000, without consideration of costs and attorneys' fees. Delta certainly was not truly admitting liability; it specifically stated that its offer was not to be so construed. Thus the offer, although in the form of an offer of judgment, was in reality nothing more than a general denial. Rule 68 does not apply to such an offer.

The issue here is genuineness, rather than reasonableness. If a contract called for delivery of a diamond, there might be a question as to whether a cheap industrial diamond fulfilled the contract; there could be no question that a counterfeit diamond would not. Here the offer of judgment was a counterfeit, an offer which was admittedly made for the purpose of accomplishing formal compliance with Rule 68 but, in the circumstances, with no expectation, not even an arguably reasonable expectation, that the amount offered would be adequate to compensate plaintiff for the injury alleged if defendant were found liable. It was a formal offer without substance other than as a general denial.

The courts have recognized that an action which is mere form without substance is a sham transaction which does not fall within the coverage of a statute despite the appearance of compliance. In as technical a field as taxation, this Court has held that a scheme which on its face required the payment of interest did not justify the deduction normally allowed for interest payments because the scheme was a sham without a real indebtedness. *Knetsch* v. *United States*, 364 U.S. 361, 367 (1960). It quoted with approval its prior decision *Gregory* v. *Helvering*, 293 U.S. 165, 170 (1935) holding that an alleged reorganization was a sham: "To do otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." So here, to treat petitioner's offer as a serious one in the circumstances of this case would be to exalt form over substance and deprive Rule 68 of serious meaning.

Since the issue is genuineness, and not reasonableness, petitioner's elaborate argument that it would be improper to read reasonableness into Rule 68 is irrelevant. There is a difference between a genuine offer and a reasonable one, although of course, the reasonableness of the offer would have a bearing on whether it is genuine. An offer may be genuine if it admits liability, even though it may seem to the offeree unreasonable. Such an offer may well fall within Rule 68 even though the offeree reasonably rejected it. Thus in *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), the court pointed out that the offer there made, although for only $25.00, was reasonable because the defendant admitted liability and agreed to discontinue infringement. That decision supports, rather than negates, our position in that the court found it necessary to overrule the plaintiff's contention there that the offer was a sham. The implication is that, if it were, Rule 68 would not have applied.

An offer which is not genuine is no more an offer for the purposes of Rule 68 than the payment of interest for a theoretical indebtedness was a true deduction for tax purposes in the *Knetsch* case, *supra*. Indeed, so much has genuineness been assumed as necessary for a valid

offer of judgment under Rule 68 that the courts have talked in terms of a reasonable or proper offer even when there was no issue with respect thereto. Thus, in *Gay* v. *Waiters Union*, (N.D. Cal. 1980), 22 FEP Cases 1149, 1150, the court said that under Rule 68, an award of costs is mandatory "provided the offer was reasonable and in good faith." In *Honea* v. *Crescent Food Truck Sales, Inc.*, 394 F. Supp. 201 (E.D. La. 1975), the court said that "if a reasonable offer is spurned, Rule 68 of the Federal Rules of Civil Procedure provides a manner in which a party can stop costs from accruing." In *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661, 666 (E.D. La. 1976) the court said that the rules provide a procedure whereby defendant "may offer what is really due." An interpretation of Rule 68 as not applying to offers which are not genuine thus does not require reading into the rule words which the framers of the Rules failed to insert. It merely interprets the words of the rule in their ordinary meaning as applying to a real, not a counterfeit, offer of judgment.

There is no difficulty in implementing this position. It is certainly as easy to determine whether a proposal is genuinely an offer of judgment as it is to determine whether a plan involving payment of interest involves a genuine indebtedness. The district court, we think, has articulated a standard which is appropriate and easily applied. If an offer is in the circumstances of a particular case, not even "arguably reasonable", it is not a genuine offer of judgment, but a sham. It is a sham because it was not intended to induce the plaintiff to settle the case but merely to constitute a device to take away from the district court the discretion not to impose costs against an unsuccessful plaintiff. This Court should not allow a salutary rule to be misused for such an unjust purpose.

It is well established that, in interpreting a statute, the courts look, not only to a particular clause but to the statute as a whole, and interpret it in light of its purpose. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970). A literal reading of a statute which leads to absurd results is to be avoided where the statute can be interpreted in a way which better comports with its purpose. *United Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979); *Haggar* v. *Helvering*, 308 U.S. 389, 394 (1940). The interpretation of Rule 68 which we here suggest prevents a token offer from serving to deprive district courts of their discretion to decline to award costs against a plaintiff who in good faith, even if unsuccessfully, sought to vindicate an important civil right. Rule 68, which was designed to promote settlements, should be interpreted as relating only to genuine offers to permit judgment against the offeror.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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